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**BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON**

**CLALLAM RIVER RESORT and
DONALD R. BAKER,**

Appellant,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,**

Respondent.

FPAB NO. 94-15

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding.

Appearances were as follows:

1. Mr. Donald R. Baker, landowner, pro se.

2. Mr. John E. Justice, Assistant Attorney General, Department of Natural Resources.

The hearing was conducted on June 2, 1994, in Lacey, Washington.

Lenore Schatz, Gene Barker & Associates, Olympia, Washington, provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. Board members Norman L. Winn, Chairman, Dr. Martin R. Kaatz, and Robert E. Quidbach, have reviewed the record. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FPAB NO. 94-15**

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2 **FINDINGS OF FACT**

3 **I**

4 This matter concerns 40 acres in Clallam County about 2 miles south of Clallam Bay.
5 The appellant, Mr. Donald R. Baker, owns that site which he proposes to develop as Clallam
6 River Resort.

7 **II**

8 On June 11, 1993, Mr. Baker was served by the Washington State Department of
9 Natural Resources (DNR) with a stop-work order. The order pertained to logging which was
10 being conducted on the site without an approved forest practices application. In addition,
11 DNR assessed a civil penalty of \$75 against Mr. Baker at that time. The stop work order and
12 penalty were not appealed. Nor has the penalty been paid. Neither are at issue here.

13 **III**

14 Promptly upon receiving the stop work order in June, 1993, Mr. Baker came to DNR
15 offices and made out a forest practices application. This was approved by DNR for the
16 specific purpose of allowing the removal of logs already cut, not to authorize further cutting.

17 **IV**

18 Several months after the foregoing facts, on October 25, 1993, DNR received a
19 complaint of further cutting and other forest practices by Mr. Baker. A DNR forester
20 investigated the complaint. The forester found that Mr. Baker was conducting forest practices
21 at two places: 1) on Charlie Creek within Mr. Baker's property and 2) on the Clallam River
22 north of the Baker property on property owned by Mr. Eshom.

23 **V**

24 Charlie Creek. Charlie Creek is tributary to the Clallam River. Charlie Creek is a
25 Type 2 water and the Clallam River is a Type 1 water under forest practices regulations. The
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2 Creek enters the River on Mr. Baker's property. Mr. Baker, desiring to "daylight" the area
3 along Charlie Creek, harvested trees there. The riparian managemnet zones (RMZ) is 75 feet
4 on each side of Charlie Creek. This was entered by Mr. Baker, on both sides, over a 410 foot
5 length of the Creek. Before Mr. Baker's actions there were 29 trees in the left RMZ and 36
6 trees in the right RMZ. Mr. Baker cut 7 and 11 trees, respectively, leaving 22 in the left
7 RMZ and 25 in the right RMZ. Both before and after the cut, the trees within each RMZ
8 were below the minimum which must be maintained for wildlife and fisheries habitat.

9 VI

10 The waters of the Clallam River presently exceed the maximum temperature allowed by
11 the state water quality standards which is 16 degrees centigrade. See WAC 173-201A-
12 030(I)(C)(iv). The excessive removal of trees and shade within the riparian management zone
13 of Charlie Creek probably aggravated the existing temperature problem in the Clallam River.
14 Moreover, it is likely that corresponding harm was done to fish habitat which is dependent on
15 cool water temperature.

16 VII

17 Eshom Property. Mr. Baker conducted log salvage from the Clallam River several
18 years prior to this matter. Pertinent here is the fact that Mr. Baker then obtained a Hydraulic
19 Project Approval. His equipment entered the Clallam River to retrieve available logs. The
20 logs were decked.

21 VIII

22 In this matter, Mr. Baker had returned to the decked logs to haul them away.
23 However, incidental to removing the decked logs, he did recover a few logs from near the
24 river's bank. On those occasions, his skidder crossed the ordinary high water mark (OHWM)
25 of the River. The OHWM is defined as:

...the mark on the shores of all waters, which will be found by examining the beds and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation ... WAC 222-16-010.

IX

Mr. Baker did not have a Hydraulics Project Approval for operation of his skidder within the OHWM.

X

Mr. Baker's log hauling and recovery on the Eshom site were conducted outside the boundaries of his previously approved forest practices application. He made no new forest practices applications before conducting those activities.

XI

The DNR assessed a civil penalty of \$500 against Mr. Baker for harvest within the RMZ of Charlie Creek. It assessed a \$500 civil penalty for operation of equipment within the OHWM of the Clallam River on the Eshom property and a further \$100 civil penalty for conducting forest practices on the Eshom property without an approved forest practices application. These civil penalties total \$1,100. From these, Mr. Baker appeals.

XII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

**FINAL FINDINGS OF FACT,
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FPAB NO. 94-15**

1
2
3 **CONCLUSIONS OF LAW**
4

5 **I**

6 Charlie Creek. Under the timber harvesting regulations a riparian management zone
7 may extend to a width of 75 feet on either side of a Type 2 water which itself is less than 75
8 feet wide. WAC 222-30-020(3). This is the case with respect to Charlie Creek. Under the
9 same regulation, 100 trees must be left on each side per 1000 foot stretch of the Creek. Id.
10 This means 41 trees are to be left on each side of the 410 foot stretch of the Creek in question.
11 As there were not 41 trees on either side of the Creek in the 410 foot stretch before
12 Mr. Baker's harvest, all of his harvest within the RMZ was in violation of
13 WAC 222-30-020(3).
14

15 **II**

16 Eshom Property. Under the timber harvesting regulations, skidders shall not be used in
17 Type 1 water except by approval of DNR and with a Hydraulic Project Approval from the
18 Washington State Department of Fisheries and Wildlife. WAC 222-30-070. The term
19 "Type 1 water" is defined to mean large rivers (such as the Clallam River) "within their
20 ordinary high water mark". WAC 222-16-030(1). By operating a skidder within the OHWM
21 of the Clallam River without DNR approval, nor a Hydraulic Projects Approval, Mr. Baker
22 violated WAC 222-30-070. Because that skidder operation was part of log salvaging, a "forest
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1 practice" under WAC 222-16-010, Mr. Baker also violated WAC 222-20-010(I) by conducting
2 a forest practice without an approved forest practice application.
3

4 III

5 Amount of Penalty. A civil penalty may be assessed at the rate of \$500 per violation
6 for each forest practices regulation violated. RCW 76.09.170. (Since amended to substitute
7 \$10,000 for \$500). The DNR correctly determined that Mr. Baker had prior knowledge of
8 the need for a forest practices application and prior knowledge that his earlier application
9 approval did not cover the new forest practices in an RMZ on his own property or operations
10 on the Eshom property. The \$500 civil penalty for operations in an RMZ and \$100 civil
11 penalty for operating without an approved application are justified.
12

13 IV

14 Mr. Baker's knowledge of the need for a Hydraulics Project Approval when entering a
15 river with a skidder cannot, however, be equated with prior knowledge that the same is true
16 for entering the OHWM without substantially entering the river. That factor, prior knowlege,
17 should be reduced with corresponding reduction of the penalty from \$500 to \$250 for that
18 violation.
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20 V

21 Civil penalties should be affirmed in the total amount of \$850.
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VI

Restoration. In this case, the stop work order for Charlie Creek could have required that the RMZ be restored by replanting trees to replace the ones cut down. RCW 76.09.080(2)(c). We are of the opinion that such an order should be issued by DNR here and in similar cases so that the shade requirements will one day be restored. If the operator fails to undertake that restoration, the DNR should perform that restoration and pass along the cost to the landowner. See RCW 76.09.120. The cost to restore the RMZ by replanting would be small relative to the gain in restoring shade to fish habitat.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

1 From the foregoing, the Board issues this:

2
3 ORDER

4 Each violation is affirmed; provided that the amount of total penalty is abated, in
5 accordance with the above, to the sum of \$850, which amount is affirmed.

6 DONE at Lacey, WA , this 12th day of July, 1994.

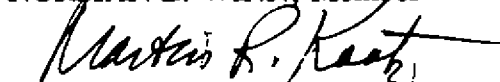
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11
12 FOREST PRACTICES APPEALS BOARD

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14 NORMAN L. WINN, Member

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16 DR. MARTIN R. KAATZ, Member

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18 ROBERT E. QUOIDBACH, Member

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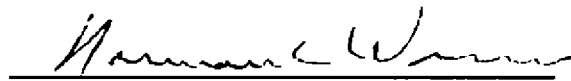
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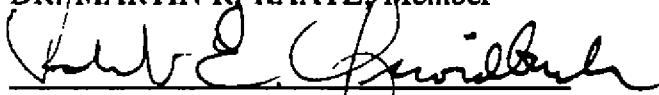
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